

the Borough for wages paid in connection with those services.¹ In early 1993, at the direction of Borough officials, Brice began working an additional twelve hours per week providing security and drug interdiction services at public housing projects. The Borough never advised Brice that he would be paid for his overtime. However, in 2002, an auditor for the WCHA informed Brice that the Borough had received compensation for his overtime and advised Brice that he should have been paid for that extra work. The Borough refused Brice's request to compensate him for the overtime. (Complaint, ¶¶ 3-14, R.R. at 13a-15a.)

¹ Paragraph 5 of the Agreement states as follows:

[The Borough] agrees to submit monthly invoices to [the WCHA] for reimbursement of wages paid by [the Borough] to the police chief for supervision/administration of said services and to police officers assigned to and actually providing said services. The rate of wage reimbursement by the [WCHA] to the Borough for the wages of the police chief and the officers actually providing the services will be the actual, regular or overtime, if applicable, hourly rate paid by the Borough to the officers for such services. Exhibit A, attached hereto[,] summarizing police activity must be accompanied with time sheets and documentation of written work assignments. Reimbursable benefits included in the contract amount are FICA (Employer portion only), Medicare, and Workmen's Compensation. Police officers will use ... approved daily activity forms. [The WCHA] shall have the right to inspect all time sheets [and] work assignment documentation. (The [WCHA] is required by regulation to conduct, evidenced by documentation, an evaluation of time sheets and work assignments).

(R.R. at 126a.)

In Count I of the complaint, Brice alleged that the “Borough’s failure and refusal to pay Brice for his overtime work constitutes a breach of contract between the parties.” (Complaint, ¶16, R.R. at 16a.) Based on his assertion that his hourly rate of pay is \$21.81 and that he is entitled to be paid time and a half for these additional hours, Brice sought \$455,263.43 in damages, plus interest and costs.²

In its answer, the Borough denied that Brice is employed as its Chief of Police. Instead, the Borough asserted that Brice is the Superintendent of Police, a managerial, salaried employee who, in fact, was responsible for deciding who would be assigned the duties required under the Agreement.

In his deposition testimony, Brice acknowledged that: (1) he is the Borough’s Superintendent of Police, and, as such, he managed and scheduled all of the Borough’s full-time and part-time police officers; (2) the findings of the Pennsylvania Labor Relations Board, in a decision excluding the position of Superintendent from the Borough’s police bargaining unit, were accurate; (3) in addition to working his regular hours, Brice stopped in at the police station to check on other shifts and reported to scenes of accidents or crimes, and he did not receive additional pay for that additional time; and (4) prior to Brice’s conversation with the auditor in 2002, he never expected to be paid more than his normal salary for the hours he worked at the public housing communities. (R.R. at 103a-08a,

² In his answer to the Borough’s motion for summary judgment and at oral argument on that motion, Brice agreed to the dismissal of counts II and III of the complaint. (R.R. at 175a-78a, 242a.)

112a.) Brice also testified that he believed the Borough would not have to pay FICA, unemployment or Social Security costs related to the extra hours that he worked because he “was willing to give up the pay” he was supposed to receive to pay those costs. (R.R. at 212a.) In addition, Brice’s counsel clarified that this breach of contract claim was based on an agreement between Brice and the Borough and was *not* based on the Agreement between the Borough and the WCHA. (R.R. at 116a-17a.)

Discovery closed in the fall of 2006. On March 15, 2007, the Borough filed a motion for summary judgment in the nature of a demurrer. In his answer to that motion, Brice asserted that he is entitled to recovery based on: (1) the “express contract between the parties”; (2) the fact that he is a third-party beneficiary of the Agreement between the Borough and the WCHA; (3) the fact that the Borough is equitably estopped from denying that it owes him payment; and (4) the fact that the Borough will be unjustly enriched unless Brice is compensated. Brice also asserted that he is entitled to overtime pay for his services pursuant to the Borough’s Superintendent of Police Handbook. (R.R. at 175a-76a, 179a.)

The trial court concluded that neither the Superintendent of Police Handbook nor the Agreement between the Borough and the WCHA supported Brice’s claim that he was entitled to additional pay for overtime. The trial court observed that, during Brice’s deposition, Brice’s counsel denied he was asserting any claim that Brice was a third-party beneficiary of the Agreement between the Borough and the WCHA. Nevertheless, the trial court briefly addressed that theory and held that Brice was not an intended third party beneficiary under

Pennsylvania contract law.³ (R.R. at 244a-47a.) In its subsequent opinion, pursuant to Pa. R.A.P. 1925(a), the trial court added that Brice waived the issues of equitable estoppel and unjust enrichment because he did not assert those theories of recovery earlier. (R.R. at 268a-29a.) The trial court granted the Borough's motion for summary judgment and dismissed Brice's complaint with prejudice. Brice now appeals to this court.

Initially, we note that summary judgment is properly granted where there is no genuine issue of material fact as to a necessary element of a cause of action and the moving party has established entitlement to judgment as a matter of law. *Wenger v. West Pennsboro Township*, 868 A.2d 638 (Pa. Cmwlth.), *appeal denied*, 586 Pa. 732, 890 A.2d 1062 (2005). As with all summary judgment cases, we must view the record in the light most favorable to the opposing party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Id.* In order to withstand a motion for summary judgment, a non-moving party must produce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor.⁴ *Id.* The failure to adduce this evidence

³ See *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa. Cmwlth. 1994), (holding that in order for a party to recover under a contract as a third party beneficiary, both parties to the contract must so intend and must indicate their intent in the contract), *appeal denied*, 541 Pa. 628, 661 A.2d 875 (1995).

⁴ In pertinent part, Pa. R.C.P. No. 1035.2 provides that any party may move for summary judgment as a matter of law

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to

(Footnote continued on next page...)

establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Brice first argues that the Borough is equitably estopped from denying that he is entitled to additional compensation. To prevail under a theory of equitable estoppel, a party must demonstrate: (1) misleading words, conduct or silence by the party against whom the estoppel is asserted; (2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting estoppel; and (3) the lack of a duty to inquire on the party asserting the estoppel. *Makoroff v. Department of Transportation*, 938 A.2d 470 (Pa. Cmwlth. 2007). Brice argues that the Borough misled him by representing that monies it received under the Agreement would be used to pay FICA and other costs. Brice asserts that the Borough had a duty to inform him that he would be compensated for his time “as required under the Agreements.” (Brice’s brief, p.16.) Brice also contends that the Borough’s silence induced him to work the extra hours for which he was not paid.

However, the record does not support Brice’s argument. To the contrary, the record reflects that Brice was a managerial, salaried employee *who did not expect to be paid* for his work at the public housing communities, or for any additional hours he worked, over and above his normal salary. (R.R. at 112a.) Accordingly, Brice cannot prevail under a theory of equitable estoppel.

(continued...)

produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Brice also contends that he is entitled to recovery under a theory of unjust enrichment. Unjust enrichment is a quasi-contractual doctrine based in equity. *Wiernik v. PHH U.S. Mortgage Corporation*, 736 A.2d 616 (Pa. Super. 1999), *appeal denied*, 561 Pa. 700, 751 A.2d 193 (2000). Its elements include: (1) benefits conferred on the defendant by the plaintiff; (2) appreciation of the benefits by the defendant; and (3) the defendant's acceptance and retention of the benefits under circumstances that it would be inequitable to do so. *Wilson Area School District v. Skepton*, 860 A.2d 625 (Pa. Cmwlth. 2004), *aff'd*, 586 Pa. 513, 895 A.2d 1250 (2006).

Here, the record conclusively establishes that Brice worked additional hours at the housing projects with no expectation that he would receive additional compensation. Brice now asserts entitlement to additional compensation based entirely on the fact that *the Borough invoiced WCHA* and received "reimbursement" for wages allegedly paid by the Borough to Brice. (R.R. at 228a-30a.) We conclude that in making this argument, Brice attempts to convert the Borough's apparent misrepresentations to the WCHA as a retention of benefits unjustly conferred by *him*.

Brice states, more accurately, that "the Borough has unjustly enriched itself" by invoicing WCHA for reimbursement of wages that never were paid. (Brice's brief, p. 18.) This statement is consistent with the evidence of record, i.e. the Borough obtained a benefit by submitting invoices to the WCHA and receiving reimbursement for payments that were not made. While these facts likely would

support a cause of action against the Borough by the WCHA, they do not support a claim against the Borough under the theories asserted by Brice.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

Senior Judge Colins dissents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James L. Brice, Sr., an individual,	:	
Appellant	:	
	:	
v.	:	No. 2227 C.D. 2007
	:	
The Borough of Donora	:	

ORDER

AND NOW, this 23rd day of May, 2008, the order of the Court of Common Pleas of Washington County, dated August 9, 2007, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Judge